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MODES OF TRIAL IN THE MEDIÆVAL BOROUGHS OF ENGLAND.

THE boroughs of mediæval England doubtless generated some new ideas of government and were a progressive element of society; but historians are inclined to ignore the fact that for a long time after the Norman Conquest the burgesses exhibited a strong conservative spirit in the maintenance of Anglo-Saxon legal usages. Traces of these old usages are visible in the town charters and customals of the twelfth and thirteenth centuries, a careful study of which would probably supplement our meagre knowledge of Anglo-Saxon law. Among the instructive vestiges of a remote past imbedded in town muniments those concerning legal procedure are particularly interesting. The adherence of the burgesses to the older modes of trial is a subject which has never been adequately investigated,[1] and concerning which it is difficult to formulate general conclusions owing to the divergence of local usage and the meagreness of printed records.

To understand the peculiarities of procedure in the boroughs we must at the outset recall to mind the general history of procedure in the royal courts. In the Anglo-Saxon period justice was administered mainly in the local popular tribunals of the shire, hundred, and borough, and the most common forms of trial were compurgation and the ordeal of fire or water. After the Norman Conquest the king's court became the centre of gravity of the judicial sys-

[1] One of the best accounts will be found in Thayer's Treatise on Evidence, 24–40.

tem, and in suits tried by that tribunal the duel competed with compurgation and the old ordeals as a favorite test of justice. Henry II.'s Assize of Clarendon (1166) enacted that all indicted criminals should go to the ordeal of water; but about the year 1219 the fire and water tests were abolished and were soon replaced by the jury. In civil cases, also, this latter mode of trial rapidly gained ground since Henry II.'s reign, so that by the middle of the thirteenth century it was applied by the royal judges to most civil and criminal suits. But throughout the Middle Ages the duel and compurgation continued in use in the royal courts to a limited extent; the former to determine petitory actions and less frequently for the trial of persons appealed of felony; while compurgation was resorted to in some civil actions, especially to deny a debt or to prove that a party had not been summoned to appear in court.[1] In such cases the denial would be supported with "the twelfth hand," *i. e.*, with eleven oath-helpers, whom the chief swearer would be allowed to choose.[2]

I. *The Ordeal.* — We are now prepared to trace the history of the various forms of trial in the boroughs. As regards the ordeals of fire and water, which received a deathblow throughout Western Europe by the enactment of the Lateran Council of 1215, little need be said, and little can be ascertained from an examination of the sources. They were used by litigants in Anglo-Saxon towns;[3] they are referred to in an early, undated customal of Preston;[4] and, according to charters granted by Roger de Lacy to Pontefract in 1194, and by Maurice Paynell to Leeds in 1208, a person accused of larceny for the second time was to disprove the charge by the water ordeal or by combat.[5] On the other hand, a contemporary biographer of Thomas Becket informs us that in criminal

[1] Wm. Salt Soc. Collections, vi. pt. i. 71, 130, 134, 137, 204, xi. 58; new series, iii. 174, 175, iv. 99.

[2] On the older modes of trial (including trial by witnesses) in the royal courts, see Thayer, Treatise on Evidence, 1–46; Pollock and Maitland, English Law, bk. ii. ch. ix. § 4. Compurgation also survived in the ecclesiastical and seignorial tribunals: Pollock and Maitland, 1st ed., i. 426, 427, ii. 632.

[3] Athelstan, vi. c. 9; Ethelred, iv. cc. 3, 7: Schmid, Gesetze, 169, 219, 221.

[4] English Hist. Review, xv. 497. The customal is of the twelfth or thirteenth century.

[5] Hist. MSS. Com., viii. 270; Boothroyd, Pontefract, app. ii.; Wardell, Leeds, app. vi. Roger de Lacy asserts that the laws which he grants to Pontefract are those of Grimsby. During the twelfth and thirteenth centuries the fire and water ordeals were also used in some continental towns to rebut accusations: Lea, Superstition and Force, 4th ed., 202; Keutgen, Urkunden, 204, 207, 552.

accusations the ordeal of fire or water could not be imposed upon citizens of London, Oxford, and other towns against their will.[1] This evidence, coupled with our information regarding the prevalence of compurgation, indicates pretty clearly that the fire and water tests were not prominent, at least in criminal cases, during the second half of the twelfth century.

II. *The Duel.* — Judicial combat was regarded with aversion by the burgesses, whose vocations naturally made them inclined to adopt more peaceful modes of litigation. A London record, seemingly of the thirteenth century, condemns it as an instrument of justice, on the ground that "the strong might put to shame the weak, the young the old, for the old and the weak would not be able to make proof by battle against the strong and the young."[2] A well-known law of William the Conqueror enabled the conquered Anglo-Saxons to avoid it in criminal suits;[3] and exemption from the duel (*quod nullus burgensis faciat duellum*) is one of the most common privileges mentioned in the town charters of the twelfth and thirteenth centuries.[4] The franchise thus granted is often limited to appeals of felony — criminal accusations brought by one person against another,[5] for these were crown pleas reserved for the cognizance of the royal justices. Even when appeals are not expressly mentioned, many charters add to the exemption from battle the stipulation that "in crown pleas" the burgesses may clear themselves by a compurgatorial oath, or according to the ancient custom of the town, or according to the custom of some other town.[6] In fact the burgesses desired above all to secure protection from the duel in criminal charges jeopar-

[1] "Non examine aquæ vel ferri candentis se purgabunt nisi sponte elegerint:" Materials for the History of Becket, iv. 148. The references in the Pipe Rolls to the water ordeal (*judicium aquæ* or *juisium*) in London and Windsor probably relate to the execution of the Assize of Clarendon and throw no light on our subject: 12 Henry II., 132; 13 Henry II., 1; 14 Henry II., 198; 16 Henry II., 16.

[2] Liber Albus, 109.

[3] Stubbs, Select Charters, 84.

[4] Ibid. 108, 112, 266, 267; Rotuli Chartarum, ed. Hardy, 5, 20, 45, 56, 78, 83, 91, 135, 138, 175, 211, 217, 219; Madox, Firma Burgi, 28; Chartæ Hiberniæ, 6, 13, 20, 22, 24, 33, 36, 37, 39; Liber Albus, 128–164; Hist. MSS. Com., ix. pt. i. 166.

[5] Chartæ Hiberniæ, 6, 12, 13, 20, 22, 24, 26, 36; Rotuli Chartarum, 78; Stubbs, Select Charters, 112; Boldon Buke, ed. Greenwell, app. xli. *Cf.* Liber Albus, 109; Select Pleas of Crown (Selden Soc.), 39.

[6] Rotuli Chartarum, 20, 56, 83, 217, etc. The charter of Dunwich, 1215, seems to be the only one that specifies exemption from the duel in suits concerning land: "duellum non faciat . . . neque de terra neque de latrocinio neque de felonia neque de alia re, nisi tantum de morte hominis exterioris" (Ibid. 211).

dizing life or limb, which were tried in the eyre or *curia regis;* in their own municipal courts they were sufficiently protected by "ancient custom," which seems to have excluded judicial combat from both civil and criminal pleas.[1]

Writers who have heretofore examined this subject have, however, failed to observe that in certain cases the duel might be waged even in some of the most privileged boroughs.[2] This could be done in London in the twelfth and thirteenth centuries if both parties consented and waived the franchise of the city.[3] At Leicester, according to the finding of a jury in 1253, the duel was allowed, at least in pleas of land, until the time of Henry I.[4] At Newcastle-upon-Tyne in the reign of Henry I an appeal of treason had to be disproved by combat; and the same rule seems to be referred to in a grant of Richard I. to the citizens of York authorizing them to clear themselves by compurgation in all appeals of felony, except when they are appealed "of the body of the king."[5] A charter of Hugh Pudsey (*temp.* Hen. II.) states that a burgess of Wearmouth who is accused by a villain may defend himself by compurgation, except when accused of such felony as demands proof by combat.[6] According to charters of Bristol, 1188, and Dunwich, 1215, wager of battle was permitted when a burgess was appealed for the death of a stranger.[7] The charters of Pontefract and Leeds, already referred to in connection with the old ordeals, grant that a burgess may purge himself of a second accusation of larceny by combat; and in the thirteenth century the burgesses of Kilkenny, Carlow, and Rosbercon are exempted from the duel except for the death of a man, larceny, and other pleas *unde duellum rationabiliter fieri debeat.*[8] In the fourteenth century it was the custom at Fordwich to require a stranger (*extraneus probator*) who appealed a burgess of felony to prove his charge by fighting with the accused in the

[1] See the thirteenth century customals of Ipswich, Hereford, and Winchester: Domesday of Ipswich, 32, 36; Johnson, Customs of Hereford, 38; Archæological Journal, ix. 75. *Cf.* Fleta, bk. ii. c. 55; Lyon, Dover, ii. 273; English Gilds, ed. T. Smith, 361; Statutes of the Realm, 1810, i. 218.

[2] This statement also applies to Scotch and continental towns: Lea, Superstition and Force, 200-206; Keutgen, Urkunden, 575; Innes, Ancient Laws, 7, 8, 11, 163.

[3] Materials for the History of Becket, iv. 148; Liber Albus, 109.

[4] Records of Leicester, ed. Bateson, i. 40-42.

[5] Stubbs, Select Charters, 112; Drake, Eboracum, 204 (confirmed, 36 Henry III., ibid.).

[6] "Nisi de tali scelere appellatur pro quo recte se debeat per duellum defendere:" Boldon Buke, app. xli.

[7] Seyer, Charters of Bristol, 6 (confirmed, 1252, ibid. 17); Rotuli Chartarum, 211.

[8] Chartæ Hiberniæ, 33, 37, 39.

water of the river Stour.[1] But the wording of most of these documents indicates that we are here dealing with exceptions to a municipal privilege or general rule of burghal law which excluded judicial combat from legal procedure; and if we may judge from the few court records of boroughs which have been printed, we may conclude that in practice this rule was rarely broken.

III. *Compurgation.* — We come now to a form of purgation which was doubtless in common use in the boroughs before the Norman Conquest,[2] and was the dominant feature of burghal procedure in the twelfth and thirteenth centuries. This is evidently the mode of trial referred to in the clause of the early town charters which grants that crown pleas are to be determined according to the ancient custom of the borough.[3] Historians of legal institutions who have investigated this part of our subject have drawn their material from a limited range of sources, and have not sufficiently emphasized the wide prevalence of the compurgatorial process in the criminal actions of burgesses before and long after its disappearance as a normal form of purgation in the criminal procedure of the royal courts.

Various documents of the twelfth century refer to its use in appeals of felony or crown pleas, which, as we have already pointed out, were usually tried before the royal justices, and hence were liable to be decided by the duel, unless the chartered rights of the townsmen authorized them to purge themselves by the oaths of their neighbors. According to the customs of Newcastle-upon-Tyne, compiled in the reign of Henry I., a burgess appealed by a burgess is to defend himself not by duel but by compurgation (*per legem*);[4] and Henry I.'s charter to the citizens of London permits rebuttal by oath in crown pleas.[5] A biographer of Becket, writing between the years 1170 and 1177, says that in crown pleas the citizens of London shall respond in

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[1] Hist. MSS. Com., v. 442; Woodruff, Fordwich, 229. See also various references to the duel in the customal of Preston (twelfth or thirteenth century): English Hist. Review, xv. 497–9, 512.

[2] Ethelred, iv. cc. 3, 7: Schmid, Gesetze, 219, 221.

[3] Above, p. 693. Cf. Liber Albus, 89–92.

[4] Stubbs, Select Charters, 112.

[5] Ibid. 108. This privilege was confirmed by every king of England from Henry II. to Henry IV.: Liber Albus, 129–65; Liber Custumarum, 248–64. Charters of John, Edward III., and Richard II. grant that for any crime the punishment of which should endanger life or limb the citizens are to be judged *per legem civitatis:* Liber Albus, 148, 153; Liber Custumarum, 250.

their city, and shall be judged by their laws: they shall not purge themselves by combat or the ordeal, unless they shall voluntarily elect to do so, but every case is to be settled by oath (*ibi finis est omnis controversiæ sacramentum*).[1] Joceline de Brakelond informs us that in accusations of theft it was customary for the burgesses of Bury St. Edmunds to be acquitted by the oaths of their neighbors;[2] and, according to a charter granted by Hugh Pudsey, a burgess of Wearmouth who is appealed by a villain is to clear himself "by the civic law (*legem civilem*), namely, by thirty-six men."[3] In 1194 Roger de Lacy allows the burgesses of Pontefract to refute any charge of bloodshed with five compurgators (*jurabit se sexto*) and to refute other charges with two compurgators, but a burgess accused of larceny is to "make his law with the thirty-sixth hand," *i. e.*, with thirty-five compurgators.[4] Richard I. granted the townsmen of Colchester the right to clear themselves by oath in crown pleas, and the same king permitted the citizens of York to defend themselves in appeals by the oaths of thirty-six men of the city.[5] In 1192 Dublin received a similar privilege from Richard's brother John, but this charter requires the coöperation of forty oath-helpers.[6] In 1190 the citizens of Winchester were authorized to make their rebuttal in crown pleas "according to the ancient custom of the city," which is explained by a grant of William the Lion (1165–1214) to the boroughs of his kingdom to mean "by the acquittance of twelve leal burgesses."[7] Moreover, Richard I. authorized the burgesses of Lincoln, Norwich, and Northampton to deraign themselves (*se disrationare*) in crown pleas according to the custom of the city of London.[8] In the year 1200 the citizens of Lincoln claimed that they ought not to wage battle for any appeal, but that they

[1] Materials for the History of Becket, iv. 148.

[2] Memorials of St. Edmund's Abbey, ed. T. Arnold, i. 301. Joceline's reference may be ascribed to the last quarter of the twelfth century.

[3] Boldon Buke, app. xli. Pudsey died in 1195.

[4] Hist. MSS. Com., viii. 270. The same rules are laid down in the charter of Leeds, 1208: Wardell, Leeds, app. v., vi. Roger de Lacy asserts that the laws which he grants to Pontefract are those of Grimsby.

[5] Madox, Firma Burgi, 28; Drake, Eboracum, 204.

[6] Chartæ Hiberniæ, 6, 12.

[7] Stubbs, Select Charters, 266; Innes, Ancient Laws, 163; *cf.* ibid. 11, for this form of oath in the first half of the twelfth century. King John granted the burgesses of Marlborough and Newcastle-upon-Tyne the right to be tried according to the law or ancient custom of Winchester: Rotuli Chartarum, 135, 219.

[8] Stubbs, Select Charters, 267; Fœdera, 1816, i. 63; Hartshorne, Northampton, 24. For confirmations by King John, see Rotuli Chartarum, 5, 20, 45.

should be tried according to the laws and liberties of London; and in an appeal of robbery before the royal justices in the same year a citizen of Lincoln waged his law with the thirty-seventh hand.[1]

The evidence showing that burgesses could substitute compurgation for the duel in criminal cases tried before the royal justices is even more abundant in the thirteenth century. During the reign of John the citizens of Waterford were granted the right to purge themselves in appeals of felony by the oaths of twelve, the townsmen of Dunwich by the oaths of twenty-four, and the men of Egremont (in accusations of robbery) by the oaths of thirty-six.[2] Charters of Henry III. prescribe twenty-four compurgators for appeals in Cork and Drogheda, and thirty-six in Scarborough;[3] charters of Edward I. prescribe twenty-four in Berwick and forty in Limerick.[4] In pleas before the royal justices in 1202 and 1225 charges were refuted "with the twelfth hand" by men of Bedford and Shrewsbury.[5] During the thirteenth century the crown pleas of the citizens of London were determined by thirty-six, eighteen, or six *purgatores*, according to the gravity of the offence;[6] and the procedure of London in such pleas was adopted as a model by Oxford and other towns.[7] In the courts of the Cinque Ports a charge of felony might be disproved with thirty-six helpers, of whom twenty-four were usually set aside or excused from swearing, and this practice still survived late in the fifteenth century.[8] At Fordwich, which was a member of the Cinque Ports, the buyer of stolen

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[1] Select Pleas of the Crown, 39.

[2] Chartæ Hiberniæ, 13; Rotuli Chartarum, 211; Hutchinson, Cumberland, ii. 24. In 1232 the number at Waterford is twenty-four instead of twelve: Chartæ Hiberniæ, 22.

[3] Chartæ Hiberniæ, 24, 26; Baker, Scarborough, 30.

[4] Scott, Berwick, 247; Chartæ Hiberniæ, 36.

[5] Select Pleas of the Crown, 27, 115.

[6] Liber Albus, 57–59, 103–12. If the king was prosecutor, law was waged with six instead of thirty-six: Ibid. 91–92, 112.

[7] Liber Custumarum, 672; Roberts, Lyme Regis (1834), 25; Petyt MS., Inner Temple Library, No. 536, xiii. 225, xiv. 216–21 (Newton, Dorset; and Melcombe-Regis); and see the charters of Richard I. to Lincoln, Norwich, and Northampton, mentioned above, p. 696. In 34 Henry III. the royal justices permitted a citizen of Norwich to rebut an appeal of felony according to the custom of London, with thirty-six oath-helpers: Blomefield, Norfolk, iii. 48. Crown pleas of the burgesses of Great Yarmouth and Lynn were to be tried according to the law of Oxford: Rotuli Chartarum, 138, 175 (charters of King John).

[8] Lyor, Dover, ii. 269–71, 300, 301, 315, 347–8, 372–3; Woodruff, Fordwich, 231, 271; Hist. MSS. Com., vi. 544 (cases at Romney, 1475–76); Palgrave, Commonwealth, ii. 117–18 (cases at Winchelsea, 1435–41).

property could prove "with the third hand" that he bought it in good faith; the second time such property was purchased and claimed four conjurators were to be produced, and the third time twelve.[1] In the boroughs of Wales also we hear of the *sacramentum vicinorum* in connection with such *res furtiva* openly purchased.[2] Some towns of Ireland were allowed to follow the custom of Dublin as regards the trial of crown pleas.[3]

Many other documents bear witness to the prevalence of compurgation in the municipal courts of the thirteenth and fourteenth centuries in both criminal and civil suits. Thus many suits concerning debt, theft, assault, defamation, illegal trading, and other trespasses were tried in this way at Leicester, Exeter, Weymouth, Faversham, New Romney, Wallingford, and Andover,[4] and wager of law is expressly allowed in such cases by ordinances of London and Southampton.[5] For trespasses like assault without bloodshed and in pleas of debt, law was waged in London with six oath-helpers, in other towns usually with from two to five.[6]

The main qualification of compurgators was that they should be good and true men (*legales homines*) of the borough.[7] The Customal of Sandwich, speaking of the plea of debt, says that if any of them have been convicted of perjury, have performed public pen-

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[1] Woodruff, Fordwich, 243–4 (fourteenth century).

[2] Charters of Carmarthen, 8; Placita de Quo Warranto, 820 (Cardigan); Archæologia Cambrensis, 1879, x. suppl. xxxvii., xlii. (Haverfordwest, Laugharne). As to the corresponding Anglo-Saxon custom, see Ine, c. 25, § 1.

[3] See the charters of Drogheda, 1229, Dundalk, 1379, and Athboy, 1407: Chartæ Hiberniæ, 20; Merewether and Stephens, Hist. of Boroughs, 776, 810.

[4] Records of Leicester, i. 88, 160, 204, 224, 275, 289, ii. 31, 179, 181, 185, etc.; Oliver, Exeter, 308, 315; Hist. MSS. Com., v. 577-8, vi. 501–3, 541–2, 573–5; Gross, Gild Merchant, ii. 297–342. These cases extend from the first half of the thirteenth century to about the middle of the fifteenth.

[5] Liber Albus, 204, 294–5; Hist. MSS. Com., xi. pt. iii. 9. The ordinances of London belong to the thirteenth or fourteenth century, those of Southampton to the year 1348. See also the customals of New Romney and Preston: Lyon, Dover, ii. 322; English Hist. Review, xv. 497.

[6] For pleas of debt, see Liber Albus, 204, 294–5; Records of Leicester, ii. 29, 158, 181, 184; Domesday of Ipswich, 170–72; Hist. MSS. Com., ix. pt. i. 171; Records of Nottingham, i. 239, 355, ii. 341; English Hist. Review, xv. 304, 498, 507. At Nottingham law was sometimes waged for debt with the twelfth hand, as in the royal courts: Ibid. i. 151, ii. 19.

[7] Liber Custumarum, 321; Lyon, Dover, ii. 270, 315, 379; Chartæ Hiberniæ, 6, 12, 13, 22, 24, 26, 36; Rotuli Chartarum, 211 ("lawworthy men, neighbors and peers"). At Fordwich and Winchelsea conjurators may, however, be strangers or denizens: Woodruff, Fordwich, 271; Palgrave, Commonwealth, ii. 113; Lyon, Dover, ii. 379. The Anglo-Saxon laws also mention true or lawful men, neighbors, and peers: Essays in Anglo-Saxon Law, 297–8.

ance, or have conspired against their lord and have fled hither, or are fugitives for murder or theft, or if a son is produced to swear for the father or a servant for his master, or if a man is an enemy of the defendant, such persons cannot be admitted to prove or acquit upon a challenge.[1] At Leicester they were not to be men suspected or impleaded, but "good and lawful folk no way hired or accustomed to go to false oaths."[2] The municipal records present some curious details regarding the appointment of conjurators and the manner of administering the oath. At Ipswich in the thirteenth century it was customary for the defendant who denied a debt to bring into court ten men, who were divided into two equal groups, between which a knife was thrown, and the five toward whom the handle fell would sit aside, while the other five would remain with him who was to make his law.[3] At Leicester it used to be the custom in pleas of debt and trespass for the plaintiff to name the defendant's compurgators, but in 1277 it was enacted that "henceforth the defendant is to be at his law by as many as the court shall award of good and lawful men;" in some cases, however, the defendant sits between two persons whom he seems to elect as his oath-helpers.[4] If a freeman of the Cinque Ports was appealed of felony, he was required to produce thirty-six conjurators, twelve of whom were selected by the town officers to swear each by himself that the oath of the accused was true (*bonum et fidele*) and that he was not guilty; but if any of them will not swear unconditionally "the prisoner shall be dead."[5] In the trial of the crown pleas of London the *purgatores* were elected by "the mayor and citizens," but they could be challenged by the accused "for hatred or for kindred or for any other thing, and such person ought to be removed and another substituted." When the accused was content with the panel he took his oath, and six of his helpers swore that to the best of their knowledge and belief (*secundum scientiam suam*) his oath was true (*sanum et salvum* or *fidele*);[6] then

[1] Lyon, Dover, ii. 292.

[2] Records of Leicester, i. 159, 218 (A. D. 1277–92). According to Pollock and Maitland (English Law, ii. 634), there were such "professional swearers" in the king's courts at Westminster.

[3] Domesday of Ipswich, 170–72. In Anglo-Saxon times oath-helpers were sometimes chosen by lot: Leges Henrici Primi, c. 66, § 10.

[4] Records of Leicester, i. 158–60, 224, 275, 289.

[5] Lyon, Dover, ii. 269–71, 300, 301, 314–16, 347–50, 372–9; Sussex Archæol. Collections, xiv. 73–74, xviii. 51 (Hastings and Pevensey, 1356–57) Woodruff, Fordwich, 271–2 (fifteenth century).

[6] At Norwich also, in 34 Henry III., compurgators swear that they "believe" the principal's oath to be true: Blomefield, Norfolk, iii. 48.

he repeated his oath, and six more swore to its truth, and so on until the panel of eighteen or thirty-six was exhausted.[1] Before 1268 posthumous oaths of compurgators seem to have been accepted in London, for a charter of 52 Henry III. grants that the citizens may deraign themselves by oath in crown pleas "except that they should not swear on the graves of the dead as to what the deceased would have said when alive" — an exception which is also found in the charters of Lyme Regis, Melcombe Regis, and Newton.[2] Another interesting feature of procedure in London is mentioned in connection with pleas of debt and other personal actions: the defendant, if a stranger (*foraneus*), can make his law with the third hand that he owes nothing, and if he cannot find two helpers he shall swear in six churches nearest the gildhall that the oath which he took was good.[3]

We have noted some practices in the compurgatorial system of the boroughs which are evidently survivals of Anglo-Saxon usage, especially certain qualifications of the oath-helpers and the oaths on the graves of the dead and on various altars. The main points of divergence from Anglo-Saxon usage are the disqualification of kinsmen to act as compurgators[4] and a tendency in some towns to make compurgators mere "witnesses to character" in that they swear only as to their "belief" in the truth of the principal's oath. But in the Cinque Ports the older custom of swearing without reservation that the oath is true was maintained. Then, too, in Anglo-Saxon times the court seems sometimes to have selected the oath-helpers from a number of men chosen by the party offering proof,[5] as in the Cinque Ports, and perhaps in some cases his oath-helpers were named by his opponent,[6] as at Leicester and on

[1] Liber Albus, 56–59, 91–92, 103–5, 110–12. In "the great law" (*i. e.*, wager with thirty-six) the rule was changed so as to require the principal to swear only once. The same document, which is undated, also states that if any one of the thirty-six "should fail him or retract, then he (the accused) is a dead man:" Ibid. 111–12.

[2] Liber Custumarum, 252; Liber de Antiquis Legibus, 103; Roberts, Lyme Regis (1834), 25; Petyt MS. (Inner Temple Library), No. 536, xiii. 225 (Newton, Dorset), xiv. 216–21. For the *juramentum ad mortui tumulum* in Anglo-Saxon England, Wales, and Germany, see Ine, c. 53; Ethelred, ii. c. 9, § 2; Lea, Superstition and Force, 4th ed., 56.

[3] Liber Albus, 203. According to Fleta, ii. c. 63, the reduplication of the oath on nine altars was a common practice of merchants in England. For a similar custom among the Anglo-Saxons and Franks, see Alfred, c. 33, and Lea, Superstition and Force, 28.

[4] Some Anglo-Saxon laws even required that kinsmen should be produced as oath-helpers: Brunner, Rechtsgeschichte, ii. 380.

[5] Leges Henrici Primi, c. 66, § 9.

[6] Brunner, Rechtsgeschichte, ii. 383; but cf. Schmid, Gesetze, 566.

the continent; but more frequently the chief swearer, in the Anglo-Saxon period, either freely elected them or took them from a number of men designated by the court. Finally, it should be noted that criminal charges could be refuted with the twelfth or thirty-sixth hand,[1] as in some boroughs of the twelfth and thirteenth centuries.[2]

IV. *The Jury.* — We have seen that in the boroughs of the thirteenth century compurgation was the most common method of proof in both civil and criminal pleas. Regarding its use in actions concerning burgage tenements, however, the sources at our disposal are silent. A clause of many early town charters prescribes that such actions are to be tried "according to the custom of the borough,"[3] but what that custom was in the twelfth century is not explained. Probably this clause was intended to afford protection not merely from the duel, but also from trial by royal assizes or inquests. Exemption from the latter (*nulla recognitio fiat in civitate*) is expressly granted to Bristol in 1188 and to Dublin in 1192.[4] That the burgesses disliked to have litigation concerning their tenements settled by inquests held in the presence of the royal justices is also demonstrated by other documentary evidence. In a plea of 6 Richard I. before the king's court the men of Marlborough assert that no "assize" ought to be taken concerning tenements in their town, and the Cinque Ports made a similar claim in the reign of John.[5]

The boroughs objected particularly to the trial of suits before the royal justices by writ of mort d'ancestor. King John granted the burgesses of Shrewsbury and Stafford that they should not be impleaded by this writ for any tenements in the borough, but that such cases should be determined by the law and custom of the borough;[6] and the plea rolls of the thirteenth century show that

[1] Alfred and Guthrum, c. 3; Cnut, ii. c. 65; Leges Will., i. cc. 14, 15, 51; Leges Hen., c. 66, § 10, c. 92, § 11.

[2] For Anglo-Saxon compurgation, see Schmid, Gesetze, 564–7; Essays in Anglo-Saxon Law, 297–9.

[3] Stubbs, Select Documents, 108, 266–7, 310; Rotuli Chartarum, 5, 20, 45, 56, 79, 83, 91, 217; Chartæ Hiberniæ, 6, 12, 13; Hartshorne, Northampton, 25.

[4] Seyer, Charters of Bristol, 9; Historic Documents of Ireland, ed. Gilbert, 53, 59. This exemption was omitted in the confirmation charter granted to Bristol in 1252 (Seyer, 18), and in 1291 an assize was held before the mayor and bailiffs (Abbreviatio Placitorum, 286).

[5] Ibid. 6, 56. According to a charter of the reign of John, no assize was to be made in Kells except with the consent of the burgesses (Chartæ Hiberniæ, 17), but probably *assisia* in this passage means ordinance (*cf.* ibid. 85).

[6] Rotuli Chartarum, 142; Wm. Salt Soc., Collections, vi. pt. i. 287.

the application of the assize of mort d'ancestor to boroughs was regarded as an infringement of their rights.[1] In 1272 a tenant of Nottingham protests that he ought not to answer the writ, because, according to the custom of his town, a man or woman can freely give, sell, or bequeath his land or tenement, and therefore "no such writ runs concerning a tenement in the said borough."[2] Bracton also states that "in boroughs the assize of mort d'ancestor does not lie" concerning burgage lands, which may be sold like chattels, and Glanvill says that it is not usually applied to such lands.[3] Nevertheless, during the fourteenth and fifteenth centuries actions called mort d'ancestor could be brought in the courts of London, Dublin, and the Cinque Ports,[4] but we are not informed regarding the nature of the verdict returned by the jury in such cases, and probably this form of action was not much used in the municipal tribunals.

The assize of novel disseisin evoked less hostility, and in the thirteenth century the royal justices sometimes tried suits of this sort concerning property in boroughs.[5] But already in the reigns of Henry III. and Edward I. this assize, or rather a substitute for it "that men clepyn fresshe force," has a recognized place in the burghal courts;[6] and during the fourteenth and fifteenth centuries jurisdiction over such cases is expressly granted to many towns.[7] The citizens of London cherished the tradition that when Henry

[1] Somerset Pleas, ed. Healey, 167; Abbreviatio Placitorum, 6, 44, 56, 71, 102, 180, 285.

[2] Ibid. 180.

[3] Bracton, ed. Twiss, iv. 262–4; Glanvill, bk. xiii. c. 11; *cf.* Year Book 21 Edw. I., ed. Horwood, 70.

[4] Liber Albus, 197–8, 404; Lyon, Dover, ii. 273, 296–7, 360; Woodruff, Fordwich, 267. The action at Dublin is said to be "in the manner of mort d'ancestor:" Historic Documents of Ireland, 254.

[5] Select Civil Pleas, 90–91; Bracton's Note Book, ii. 598, iii. 217; Wm. Salt Soc., Collections, vi. pt. i. 56; Abbreviatio Placitorum, 291. For a case in 1363, see Records of Nottingham, i. 181.

[6] Fleta, bk. ii. c. 55; Liber Albus, 109, 114, 195–7, 447; Domesday of Ipswich, 40–46; Johnson, Customs of Hereford, 16, 17; Archaeol. Journal, ix. 75 (*cf.* English Gilds, ed. T. Smith, 361); Historic Documents of Ireland, 242, 245, 432. For the fourteenth century and later, see Oliver, Exeter, 314; Royal Letters of Oxford, ed. Ogle, 44; Chartæ Hiberniæ, 85; Liber Assisarum, f. 232; Records of Nottingham, ii. 5, 35, 99; Lyon, Dover, ii. 272, 296, 360; Woodruff, Fordwich, 267; Fitzherbert, Natura Brevium, f. 7; Registrum Prior. Omnium Sanctorum, Dublin, ed. Butler, 44, 49. The burghs of Scotland also had an assize of fresh force: Innes, Ancient Laws, 165.

[7] Merewether and Stephens, History of Boroughs, 739, 742, 810, 813, 865, 885; Seyer, Charters of Bristol, 48–50; Johnson, Customs of Hereford, 57; Stevenson, Cal. of Records of Gloucester, 13; *cf.* Rotuli Parl., iii. 24.

II. introduced the assize of novel disseisin they protested against its application to their tenements by the royal justices, and that their claim to be exempt from it was allowed.[1] The action of fresh force provided a remedy, without royal writ, for disseisin or intrusion by a bill brought within forty days after the force had been committed, the issue being tried by an inquest of twelve men.[2]

In boroughs, as in other franchised places, suits concerning the ownership of land were begun by a royal writ of right, and in many boroughs such suits were decided since the thirteenth century by a jury of twelve burgesses.[3] Fleta tells us that pleas could not be tried by the grand assize in royal cities and boroughs, because such towns belong to the ancient demesne of the crown and are not knight's fees.[4] A distinctive feature of this assize was the requirement that the jury should consist of knights; and the burgesses naturally desired that in litigation concerning their property the verdict should be found by their peers. Fleta's statement seems to conflict with a case which came before the royal justices in 1220, when the bailiffs of Kingston-on-Thames testified that "the grand assize lies in that town;"[5] but perhaps there was some doubt as to whether Kingston was a free borough,[6] and the proceedings suggest that there were towns in which the grand assize would not lie. In 1243 the burgesses of Wells asserted that this assize ought not to be held concerning their burgage tenements because a charter of King John made Wells a free borough.[7] In the usages of Winchester, ascribed to the thirteenth century, it is stated that the grand assize is debarred, but suits resulting from the writ of right are tried by a jury of twelve "good men;" and according to the Customal of Dover there could be no grand assize in that port.[8]

[1] Liber Albus, 114.

[2] "Nec locum habebit breve novæ disseisinæ in hujusmodi locis sed sufficit sola querimonia infra quadraginta dies a tempore disseisinæ factæ:" Fleta, bk. ii. c. 55. As to the period of forty days, see also Domesday of Ipswich, 40, 44; Abbreviatio Placitorum, 291; Charters of Carlisle, ed. Ferguson, 20; Chartæ Hiberniæ, 85. But in London it was forty weeks and in Dublin a year and a day: Liber Albus, 195; Historic Documents of Ireland, 432.

[3] Bracton, ed. Twiss, v. 86; Abbreviatio Placitorum, 291; Johnson, Customs of Hereford, 38; Liber Albus, 181; Liber Custumarum, 369; Domesday of Ipswich, 28–36; Archæological Journal, ix. 75.

[4] "Si autem breve de recto in hujusmodi curiis differatur, per duellum vel per magnam assisam non debet terminari," etc.: Fleta, bk. ii. c. 55. *Cf.* Statutes of the Realm, 1810, i. 218; for Wales and Kent, see ibid. i. 65, 225.

[5] Bracton's Note Book, ii. 75.

[6] It did not receive any of the characteristic franchises of a borough until 40 Henry III.: Roots, Charters of Kingston.

[7] Somerset Pleas, ed Healey, 138.

[8] Archæological Journal, ix. 75 (*cf.* English Gilds, 361); Lyon, Dover, ii. 273.

On the other hand, at Ipswich in the time of Edward I. the tenant, after he had secured a writ of right, put himself on a jury "in the form of grand assize," but the four electors and the twelve jurors were "good and true men of the town." [1] So too in London an inquest of twenty-four freeholders of the city, summoned by officers of the civic court, decided petitory actions, which are said to be "in the nature of a grand assize." [2]

In pleas of debt and trespass, also, trial by jury was steadily gaining ground in the boroughs during the thirteenth and fourteenth centuries, and gradually tended to supplant compurgation. In some cases, especially in actions of debt, the defendant could choose one of these two modes of proof; in other cases there was a trial *per inquisitionem* by consent of the parties. In some towns wager of law retained a dominant position as late as the fourteenth or fifteenth century: for example, the Customal of Sandwich asserts that no inquest by neighbors can be held in the Cinque Ports.[3] In other towns trial by jury predominates before the close of the fourteenth century. In fact, owing to the diversity of local usage, it is difficult to generalize on this subject.

Some facts may, however, be presented to show that since the thirteenth century the general drift of development in burghal procedure was toward the displacement of compurgation by the jury. In London the latter was used in some criminal suits in the first half of Henry III.'s reign; [4] but in 1241 the royal justices obliged a person accused of crime who desired to put himself on the country to resort to "the great law," and they ruled that for the death of a man no freeman of London ought to put himself on a verdict of the citizens.[5] In 1249 and 1257 the citizens assert that the jury is lawful *ubi aliquis posset perdere vitam vel membra*, though they are opposed to its use in some other cases, and they regard the wager of law by thirty-six men as the normal method of disproving serious criminal charges.[6] In the first quarter of the fourteenth century, however, the inquest is on a parity with "the great law;" for at the eyre of 1321 it is contended on behalf of the city that any free-

1 Domesday of Ipswich, 32; *cf.* Bacon, Annals of Ipswich, 62.

2 Liber Albus, 182–3, 448.

3 "Infra libertatem quinque portuum non debet fieri aliqua inquisicio per vicinos prout alibi:" Boys, Sandwich, 452. But at Dover pleas of debt or trespass could be determined by an inquest: Lyon, Dover, ii. 278–9.

4 Liber Albus, 89, 90. For the trial of strangers (*foranei*), see ibid. 102, 106–7; Liber de Antiquis Legibus, 10.

5 *I. e.*, "ubi aliquis sequitur vel magna suspicio fuerit:" Liber Albus, 103–5.

6 Liber de Antiquis Legibus, 17, 31–35.

man can rebut an accusation involving capital punishment either by twelve jurors or by thirty-six oath-helpers.[1] In actions of debt there seems also to have been a struggle in London between wager of law and trial by jury, and the former was still holding its ground during the first half of the fifteenth century;[2] but in pleas of trespass, such as bloodshed or battery, the inquest was required unless the plaintiff assented that the defendant might purge himself "by his law."[3] At Leicester it is enacted in 1277 that in pleas of debt the parties by consent may put themselves on an inquest, and in pleas of trespass the defendant may substitute a jury for oath-helpers; but in the first half of the fourteenth century compurgation seems still to be the more popular mode of proof.[4] The Domesday of Ipswich, compiled in 1290, ascribes much importance to juries in pleas of land, debt, contract, and breach of the peace; in contracts compurgation was debarred if either party desired proof by witness or by inquest, and a debt claimed by a tally without seal could be denied either by an inquest or by compurgation.[5] In the municipal courts of Norwich, Exeter, and Nottingham, men were condemned to death by a jury during the reigns of Edward I. and Edward II.[6] In 1321 ordinances were made for the abolition of evil usages in the civic court of Dublin in the trial of trespasses and cognate matters and for the future trial of such cases by lawful inquests.[7] At Southampton it was ordered in 1348 that if a plaintiff in an action of trespass swore that the damages exceeded forty shillings, the issue should be tried "by the country," otherwise by wager of law.[8] During the second half of the fourteenth century the dominant position of the jury in civil and criminal procedure is also visible at Canterbury and Nottingham.[9]

[1] Liber Custumarum, 321.

[2] Liber Albus, 203–4, 216, 222; Statutes of the Realm, 38 Edw. III., stat. i. c. 5.

[3] Liber Albus, 294–5; *cf.* ibid. 204. Pollock and Maitland (English Law, ii. 633) believe that this rule was made in Edward I.'s reign.

[4] Records of Leicester, i. 158–60 *et passim*. Compurgation was also very prominent at Andover in the fourteenth century: Gross, Gild Merchant, ii. 297–342.

[5] Domesday of Ipswich, 28–36, 46–48, 94, 106, 126; see also Bacon, Annals of Ipswich, 57, 88.

[6] Evidences — Town Close Estate, Norwich, 11; Oliver, Exeter, 307; Records of Nottingham, i. 84, 88, 102. In a case tried before the royal justices, 34 Henry III., a citizen of Norwich cleared himself of one accusation by a jury and of another by compurgation: Blomefield, Norfolk, iii. 48.

[7] Gilbert, Cal. of Records of Dublin, i. 235.

[8] Hist. MSS. Com., xi. pt. iii. 9.

[9] Ibid ix. pt. i. 130; Records of Nottingham, i. 75, 85, 89, 103, 128, etc. For other indications of the prevalence of the jury in the fourteenth and fifteenth centuries, see Chartæ Hiberniæ, 50, 84; Cardiff Records, ed. Matthews, i. 34; English Gilds, ed. Smith, 389, 400.

It is evident that the general outlines of procedure in the borough courts of the fifteenth century, though still marked by archaic features, had been made to conform with the practice of the royal tribunals. This process of change, especially the tendency to substitute the jury for wager of law, kept pace with and perhaps was promoted by the gradual extension of municipal jurisdiction. The itinerant justices of the thirteenth century freely entered the boroughs to try crown pleas, and in the fourteenth century London and many other boroughs still had to endure these visitations, which, though not frequent, were very irksome to the burgesses and curtailed the authority of their courts.[1] But under Richard II. and his successors many towns were granted the right to have their own justices of the peace and to try all kinds of assizes and pleas, civil and criminal, though in some charters felonies are excepted.[2] Cognizance of assizes connoted trial by jury, and cognizance of serious criminal suits would, in course of time, reveal the inadequacy of compurgation as an instrument of justice. Thus the burgesses would naturally be inclined to adopt as a general maxim of litigation the ruling of Henry III.'s judges: *lex non jaceat sed inquisitio fiat.*[3]

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[1] Swinden, Yarmouth, 659-61; Historic Documents of Ireland, 210-11; Seyer, Charters of Bristol, 22, 46-78; Blomefield, Norfolk, iii. 65; Liber Albus, 51-107, 147, 296-8, etc.; Liber Custumarum, pp. lxxxiv.-c. The eyre held in London in 1321 lasted twenty-four weeks *in tribulatione et angustia:* Ibid. 382.

[2] Merewether and Stephens, Hist. of Boroughs, 125, 642, 813, 885, 891, 951, etc.; Blomefield, Norfolk, iii. 122; Davies, Southampton, 154; Drake, Eboracum, 205. Some boroughs had the right to try felonies already in Edward I.'s reign: Abbreviatio Placitorum, 254, 279; Domesday of Ipswich, 20; Bacon, Ipswich, 44, 57; Morris, Chester, 491; Oliver, Exeter, 307.

[3] Liber Albus, 90.